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No. 89-231

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SHEARSON LEHMAN/AMERICAN EXPRESS INC. and RAYMOND R. CLEMENTS, *Petitioners*,

—v.—

FRANK L. BIRD, Trustee of the FRANK L. BIRD PROFIT SHARING TRUST, FRANK L. BIRD, Individually, and JOAN SHEA, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

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MOTION OF THE SECURITIES INDUSTRY ASSOCIATION, THE ADVEST GROUP, INC., J.C. BRADFORD & CO., DAIN BOSWORTH INCORPORATED, D.A. DAVIDSON & CO., INC., DEAN WITTER REYNOLDS INC., A.G. EDWARDS & SONS, INC., GOLDMAN, SACHS & CO., J.J.B. HILLIARD, W.L. LYONS, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, PIPER, JAFFRAY & HOPWOOD INCORPORATED, PRESCOTT, BALL & TURBEN, INC., PRUDENTIAL-BACHE SECURITIES INC., AND WHEAT, FIRST SECURITIES, INC., FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Securities Industry Association ("SIA"), The Advest Group, Inc. ("Advest"), J.C. Bradford & Co. ("Bradford"), Dain Bosworth Incorporated ("Dain Bosworth"), D.A. Davidson & Co., Inc. ("Davidson"), Dean Witter Reynolds Inc. ("Dean Witter"), A.G. Edwards & Sons, Inc. ("A.G. Edwards"), Goldman, Sachs & Co. ("Goldman Sachs"), J.J.B. Hilliard, W.L. Lyons, Inc. ("Hilliard Lyons"), Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), Piper, Jaffray & Hopwood Incorporated ("Piper Jaffray"), Prescott, Ball & Turben, Inc. ("Prescott"), Prudential-Bache Securities Inc. ("Prudential"), and Wheat, First Securities Inc. ("Wheat First"), hereby respectfully move, pursuant to Rule 42 of this Court, for leave to file the annexed brief, as *amici curiae* in support of the Petitioners, urging this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Second Circuit with respect to its decision and judgment below in *Bird* v. *Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir. 1989). The consent of Shearson Lehman/American Express Inc. and Raymond R. Clements, the Petitioners, has been obtained. Consent of the Respondents has been requested but was not granted.

INTEREST OF *AMICI CURIAE*

SIA is the principal trade association of the securities industry, having as members more than six hundred securities firms in the United States and Canada. As such, it has a substantial interest in the extent to which agreements to arbitrate claims between securities firms and their customers may be enforced. Because arbitration is an efficient, fair, and economical manner of resolving disputes, most of SIA's members have agreed with many of their customers to arbitrate any controversies arising between them. Among these members are *amici* Advest, Bradford, Dain Bosworth, Davidson, Dean Witter, A.G. Edwards, Goldman Sachs, Hilliard Lyons, Merrill Lynch, Piper Jaffray, Prescott, Prudential, and Wheat First.

Amici curiae have a substantial interest in having this Court resolve whether agreements to arbitrate claims arising under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), are enforceable as valid contracts under Section 2 of the United States Arbitration Act, 9 U.S.C. § 2, as this Court has found with respect to claims arising under the antitrust laws, the racketeering laws, and the securities laws. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987); and *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, ____ U.S. ____, 109 S.Ct. 1917 (1989). *Amici* seek to clarify and make uniform the law on this issue so that the enforceability of arbitration provisions in agreements with their customers can be predicted and relied upon.

This concern is not abstract: a significant portion of *amici's* accounts, such as Individual Retirement Accounts, are subject to ERISA. The decision below has the anomalous result of rendering the same agreement enforceable as to some accounts and unenforceable as to others. As a practical matter, it would carve a major exception to the rule this Court set down in *Rodriguez* and *McMahon*: that arbitration clauses in brokerage agreements are enforceable under the Arbitration Act.

SIA has also filed *amicus* briefs with this Court on the enforceability of agreements to arbitrate in *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213 (1985), *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987), *Dain Bosworth Incorporated* v. *Johnson*, No. 88-284, and *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, ____ U.S. ____, 109 S.Ct. 1917 (1989).

Amici curiae firmly believe that the Court of Appeals erred below. The Court of Appeals, notwithstanding the congressional policy favoring arbitration contained in the United States Arbitration Act, 9 U.S.C. § 1 *et seq.* voided an agreement to arbitrate future claims brought under ERISA as a waiver of substantive rights under that statute. It did so even though this Court has often held that such an agreement does not affect substantive rights under the antitrust laws, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the securities laws, *Rodriguez De Quijas* v. *Shearson/American*

Express, Inc., ____ U.S. ____, 109 S.Ct. 1917 (1989) and *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987) and the federal racketeering statute, *McMahon*.

Amici move for leave to file this brief in order to put facts relating to arbitration practice in the securities industry before the Court. *See* proposed brief, *infra*, at 7-12. These facts, *amici* respectfully submit, will assist the Court in deciding whether to grant a writ of *certiorari*. They bear out this Court's approval of securities industry arbitration—and thus its conclusion that an agreement to arbitrate claims does not waive substantive rights. By the same token, they refute the Court of Appeals' negative assumptions about arbitration and thus undercut the basis of its decision.

WHEREFORE, the Securities Industry Association, The Advest Group, Inc., J.C. Bradford & Co., Dain Bosworth Incorporated, D.A. Davidson & Co., Inc., Dean Witter Reynolds Inc., A.G. Edwards & Sons, Inc., Goldman, Sachs & Co., J.J.B. Hilliard, W.L. Lyons, Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Piper, Jaffray & Hopwood Incorporated, Prescott, Ball & Turben, Inc., Prudential-Bache Securities Inc., and Wheat, First Securities, Inc., respectfully move this Court that leave be granted them to file the brief as *amici curiae* in support of the petition for a writ of *certiorari*.

Dated: September 6, 1989

Respectfully submitted,

/s/ James K. Manning

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

PRELIMINARY STATEMENT

The Securities Industry Association ("SIA"), The Advest Group, Inc. ("Advest"), J.C. Bradford & Co. ("Bradford"), Dain Bosworth Incorporated ("Dain Bosworth"), D.A. Davidson & Co., Inc. ("Davidson"), Dean Witter Reynolds Inc. ("Dean Witter"), A.G. Edwards & Sons, Inc. ("A.G. Edwards"), Goldman, Sachs & Co. ("Goldman Sachs"), J.J.B. Hilliard, W.L. Lyons, Inc. ("Hilliard Lyons"), Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill

Lynch"), Piper, Jaffray & Hopwood Incorporated ("Piper Jaffray"), Prescott, Ball & Turben, Inc. ("Prescott"), Prudential-Bache Securities Inc. ("Prudential"), and Wheat, First Securities, Inc. ("Wheat First") submit this brief as *amici curiae* in support of the Petitioners, and urge this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Second Circuit with respect to its decision and judgment below in *Bird* v. *Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir. 1989).

INTEREST OF *AMICI CURIAE*

SIA is the principal trade association of the securities industry, having as members more than six hundred securities firms in the United States and Canada. As such, it has a substantial interest in the extent to which agreements to arbitrate claims between securities firms and their customers may be enforced. Because arbitration is an efficient, fair, and economical manner of resolving disputes, most of SIA's members have agreed with many of their customers to arbitrate any controversies arising between them. Among these members are *amici* Advest, Bradford, Dain Bosworth, Davidson, Dean Witter, A.G. Edwards, Goldman Sachs, Hilliard Lyons, Merrill Lynch, Piper Jaffray, Prescott, Prudential, and Wheat First.

Amici curiae therefore have a substantial interest in having this Court resolve whether agreements to arbitrate claims arising under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, ("ERISA") are enforceable as valid contracts under Section 2 of the United States Arbitration Act, 9 U.S.C. § 2, as this Court has found with respect to claims arising under the antitrust laws, the racketeering laws, and the securities laws. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express* v. *McMahon*, 482 U.S. 220 (1987); and *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, ____ U.S. ____, 109 S.Ct. 1917 (1989). *Amici* seek to clarify and make uniform the law on this issue so that the enforceabil-

ity of arbitration provisions in agreements with their customers can be predicted and relied upon.

This concern is not abstract: a significant portion of *amici*'s accounts, such as Individual Retirement Accounts, are subject to ERISA. The decision below has the anomalous result of rendering the same agreement enforceable as to some accounts and unenforceable as to others. As a practical matter, it would carve a major exception to the rule this Court set down in *Rodriguez* and *McMahon*: that arbitration clauses in brokerage agreements are enforceable under the Arbitration Act.

SIA has also filed *amicus* briefs with this Court on the enforceability of agreements to arbitrate in *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213 (1985), *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987), *Dain Bosworth Incorporated* v. *Johnson*, No. 88-284, and *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, ____ U.S. ____, 109 S.Ct. 1917 (1989).

REASONS FOR GRANTING A WRIT OF *CERTIORARI*

At issue here is whether the lower courts have license to infer congressional intent to overrule the United States Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "Arbitration Act"), without any direct evidence that Congress intended to do so. Although this Court has repeatedly held in no uncertain terms that predispute agreements to arbitrate claims arising under federal statutes are enforceable under the Arbitration Act absent a showing of specific congressional intent to repeal the effect of the Arbitration Act with respect to such claims, *see Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *Shearson/American Express* v. *McMahon*, 482 U.S. 220 (1987), *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, ____ U.S. ____, 109 S.Ct. 1917 (1989), the Court of Appeals below refused to enforce a predispute agreement to arbitrate claims arising under ERISA, without even purporting to find any direct expression of congressional intent to overrule the Arbitration Act.

SUMMARY OF ARGUMENT

The opinion of the United States Court of Appeals for the Second Circuit below, *Bird* v. *Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir. 1989), held that predispute agreements to arbitrate ERISA claims are unenforceable, in spite of the Arbitration Act's mandate that an agreement to arbitrate is as enforceable as any other valid contract. The decision below rested upon two erroneous premises: (1) a conclusion, indefensible in light of this Court's recent Arbitration Act decisions, that arbitration of ERISA claims is inconsistent with that statute's "remedial" purposes, and (2) a misapplication of the test for determining whether Congress repealed the Arbitration Act by implication with respect to ERISA claims. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983). As to the former premise, it assumes that the enforcement of agreements to arbitrate ERISA claims dilutes the substantive provisions of that Act, a view consistently rejected by this Court in analogous contexts. As to the latter premise, the Court of Appeals, being unable to find statutory language conflicting with the Arbitration Act or legislative history demonstrating congressional intent to repeal the Arbitration Act, in effect overruled the substantive, congressional policies embodied in the Arbitration Act solely on the basis of its own conception of public policy.

A writ of *certiorari* is also appropriate here because a split in the Circuits exists. In contrast to the result here, the Court of Appeals for the Eighth Circuit has analyzed the issue in the manner set forth by this Court in *Mitsubishi*, *McMahon*, and *Rodriguez* and has held that predispute agreements to arbitrate *are* enforceable with respect to ERISA claims. *Arnulfo P. Sulit, Inc.* v. *Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988).

Such results as the Court of Appeals for the Second Circuit reached below can only lead lower courts to stray from the rule laid down by this Court: that the Arbitration Act is valid except

where Congress has expressed its intention, either in statutory language or legislative history, to repeal it. *Amici* respectfully submit that the petition for *certiorari* should be granted in order to prevent inconsistent treatment among the lower courts that are trying to define the scope and validity of the Arbitration Act.

POINT I

THE UNITED STATES ARBITRATION ACT MANDATES THAT ARBITRATION BE RECOGNIZED AS AN EFFICIENT AND WIDELY ACCEPTED MEANS OF RESOLVING BROKER-CUSTOMER DISPUTES IN THE SECURITIES INDUSTRY

The United States Arbitration Act provides that an agreement to arbitrate in a contract involving interstate commerce is valid to the same extent as any other contract. When Congress passed the Arbitration Act in 1925, it established a clear federal policy favoring the use of arbitration to resolve disputes. That policy marked a decisive shift from the hostility to arbitration then prevalent in the courts.

In its recent decisions, this Court has found occasion to recognize the policy behind the Arbitration Act. In *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, the Court observed:

> [W]e are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.

473 U.S. at 626-27. *Accord Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, 109 S.Ct. at 1920 (" 'the old judicial hostility to arbitrations' . . . has been steadily eroded over the years") (quoting *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942) (Frank, J.)); *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. at 24 (the Arbitration Act "is a congressional declaration of a lib-

eral federal policy favoring arbitration . . . [and] questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"); *Southland Corp.* v. *Keating*, 465 U.S. at 10 (in enacting the Arbitration Act, "Congress declared a national policy favoring arbitration . . . [that] mandated the enforcement of arbitration agreements"); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974).

The Court of Appeals' refusal to enforce predispute agreements to arbitrate ERISA claims rested in large part on its conception of ERISA as a remedial statute. In the words of the Court of Appeals:

> The federal courts have consistently interpreted ERISA as a remedial statute designed to "curb the funding and disclosure abuses of employee pension and welfare benefit plans by establishing minimum federal standards."

871 F.2d at 296-97 (quoting *Taggert Corp.* v. *Efros*, 475 F. Supp. 124 (S.D. Tex. 1979). Yet ERISA's remedial purpose can have no bearing as to whether agreements to arbitrate ERISA claims are enforceable under the Arbitration Act, unless it is assumed that arbitration of ERISA claims somehow dilutes the substantive rights conferred by that statute.

This Court has rejected the predicate of the decision below, the notion that an agreement to arbitrate controversies under a federal statute affects the substantive provisions of that statute:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.* 473 U.S. at 628; *accord*, *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, ____ U.S. ____, 109 S.Ct. at 1920-21; *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. at 232. In these cases, the Court enforced agreements to arbitrate claims arising under three of the most fundamentally remedial

bodies of federal statutory law: the antitrust laws (*Mitsubishi*), the securities laws (*McMahon* and *Rodriguez*), and the Racketeering Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-68 (*McMahon*). Indeed, the Court of Appeals' contention that the enforcement of agreements to arbitrate ERISA claims is inconsistent with ERISA's remedial purpose not only flies in the face of the decision of this Court, it echoes the Court of Appeals' since reversed conclusion in *McMahon* v. *Shearson/American Express*, 788 F.2d 94, 98 (2d Cir. 1986), *rev'd*, 482 U.S. 220 (1987), as to "the inappropriateness of the United States Arbitration Act when strong public policy considerations are involved." [1]

The established structure of arbitration in the securities industry, which this Court has recognized in *McMahon* and *Rodriguez*, refutes the Court of Appeals' assumption that the enforcement of contracts to arbitrate ERISA disputes will dilute the protection of ERISA beneficiaries. Securities exchanges and the National Association of Securities Dealers, Inc. (the "N.A.S.D."), under the supervision of the Securities and Exchange Commission (the "Commission"), provide arbitration facilities for disputes between member firms and their public customers.[2] The current procedures have evolved since 1872, when the New York Stock Exchange, Inc., first adopted arbitration procedures for customer disputes. The N.A.S.D. has maintained arbitration facilities for more than forty years.

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1 As Judge Cardamone stated in dissent below:

> Simply labeling ERISA as "remedial" is insufficient, it seems to me, to rebut the heavy presumption in favor of freedom of contract to arbitrate, particularly as the High Court has sustained the validity of compulsory arbitration agreements under other "remedial" statutes.

871 F.2d at 299-300.

2 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542 (Rule 602); N.A.S.D. Manual (CCH) ¶ 3701; N.Y.S.E. Rule 600 (a copy of the New York Stock Exchange, Inc. Arbitration Rules is contained in the Supplemental Lodging of Amici Curiae); Uniform Code of Arbitration § 1, *reprinted in* Sixth Report of the Securities Industry Conference on Arbitration (August 1989).

The exchanges and the N.A.S.D. also have permanent arbitration staffs. Their rules and constitutions contain detailed codes of arbitration procedures.[3]

Moreover, the Commission has approved the implementation and operation of this arbitral system, *see* Exchange Act Release No. 16390, (Nov. 30, 1979), 18 S.E.C. Docket 1197 (1979), and retains jurisdiction to monitor the fairness of arbitration proceedings. *See* Section 19 of the Securities Exchange Act of 1934, 15 U.S.C. § 78s. As the Commission itself argued to this Court in *McMahon*, in a brief signed by its General Counsel and Solicitor:

> [T]he Commission has had the power to ensure that arbitration procedures prescribed by the [Self-Regulatory Organizations] are adequate to enforce the rights of customers against brokerage firms that are members of SROs. In these circumstances, the suspicion of arbitration on which *Wilko* rested is inappropriate, and an agreement to arbitrate accordingly should not be deemed a waiver of rights under the Exchange Act.

Shearson/American Express, Inc. v. *McMahon*, No. 86-44, Brief of the Securities and Exchange Commission as *amicus curiae* at 13.

That the Securities Industry Conference on Arbitration ("SICA") and the Commission worked together to add further improvements to SRO arbitration codes in the year following the *McMahon* decision proves that the Commission can and will exercise its oversight authority and that SROs will respond in a constructive manner. During the Summer of 1988, the Commission invited SICA and the stock exchanges to review and possibly revise their arbitration rules in certain respects. SICA and the stock exchanges considered the matter and

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3 *See, e.g.*, Constitution of the New York Stock Exchange, Inc., Art. XI, 2 N.Y.S.E. Guide (CCH) ¶¶ 1501-1503; Rules 600-638 of the New York Stock Exchange, Inc.; Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., N.A.S.D. Manual (CCH) ¶¶ 3701-3746; Arbitration Rules of the American Stock Exchange, Inc., 2 Am. Stock Ex. Guide (CCH) ¶¶ 9540-9551J.

drafted amendments to their arbitration rules, which were adopted on May 10, 1989.

As changed, the rules require that any arbitration clause in a broker-customer agreement be highlighted and in plain language. In addition, the arbitration clause must disclose to the customer that he is thereby foregoing a jury trial in any lawsuit against his broker and agreeing to limits on discovery and appellate review.[4] The contract must also disclose the presence of the arbitration clause immediately before the customer's signature line.[5] The amendments further require that discovery requests be responded to within 30 days and provide for a prehearing conference before an arbitration panel to resolve discovery disputes.[6] Retired securities industry personnel (as well as professionals who do substantial business with securities firms) cannot serve as public arbitrators, and all who serve as arbitrators must provide their employment history for the prior ten years to the parties.[7] A record, either stenographic or taped, must be kept of all arbitration proceedings, and, lastly, arbitration awards must be made public and state the issue involved, the amount claimed, and the amount actually awarded.[8]

The long established competence of securities industry arbitrators to adjudicate disputes should dispel any suspicion of the arbitral process in that industry. The stock exchanges and the N.A.S.D. keep permanent lists of arbitrators. These lists comprise senior securities industry personnel, as well as attorneys and other professionals from outside the industry, who are well versed in the field. *See, e.g.*, Panel of Arbitrators 1988-89, 1 Am. Stock Ex. Guide (CCH) 158-60; N.A.S.D. Manual (CCH) ¶ 3702. Most have previously served as arbitrators and are therefore well acquainted with arbitration procedures and customs. Thus, this Court's observation in *Mitsubishi* that "adapt-

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4 *See* N.Y.S.E. Rule 637(1).

5 *See* N.Y.S.E. Rule 637(2).

6 *See* N.Y.S.E. Rule 619(a)(2), (d).

7 *See* N.Y.S.E. Rules 608 and 610.

8 *See* N.Y.S.E. Rules 623 and 627.

ability and access to expertise are hallmarks of arbitration," 473 U.S. at 633, hits the mark with respect to the securities industry.

The arbitration rules of the N.A.S.D. and the various stock exchanges further ensure that arbitration practice in the securities industry will be efficient and impartial. For example, these rules require a majority of "public" arbitrators (*i.e.*, unaffiliated with member firms) in disputes between public customers and member firms unless the customer requests otherwise.[9] Arbitrators are required to disclose any business affiliation with any parties before them, and may be disqualified for cause for even the appearance of a conflict of interest.[10] Each party in an arbitration has at least one peremptory challenge, as well as unlimited challenges for cause.[11]

The arbitration itself provides for a full and fair hearing. The parties have the right to be present at the hearing, to be represented by counsel, to cross-examine witnesses, and to have a transcript of the hearing taken. They may subpoena witnesses and documents just as in a court proceeding, and may also compel the presence of any employee of a member of the sponsoring institution at a hearing, regardless of whether that employee would be within the subpoena power of the courts for the state where the hearing is held.[12] Moreover, arbitrators serve, and witnesses testify, under oath.[13] The fairness of these rules and

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9 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542 (Rule 602); N.A.S.D. Manual (CCH) ¶ 3719; N.Y.S.E. Rule 607; Uniform Code of Arbitration § 8.

10 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542(f)-9542A (Rules 602(f) and 603); N.A.S.D. Manual (CCH) ¶ 3723; N.Y.S.E. Rule 610; Uniform Code of Arbitration § 11.

11 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542(f) (Rule 602(f)); N.A.S.D. Manual (CCH) ¶ 3722; N.Y.S.E. Rule 609; Uniform Code of Arbitration § 10.

12 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9545A, 9548-49, 9551A (Rules 607, 610-11, 614); N.Y.S.E. Rules 614-15, 619, 623; Uniform Code of Arbitration ¶¶ 15-16, 20.

13 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9551B (Rule 615); N.Y.S.E. Rule 624; Uniform Code of Arbitration § 25.

procedures is borne out by the results of arbitrations conducted under them. For the years 1980-1988, 51% of public customer cases that went to arbitration before one of the stock exchanges or the N.A.S.D. and were decided—rather than being settled—awarded damages to the customer.[14]

Moreover, the arbitration process significantly reduces discovery expenses and minimizes delay in reaching a hearing. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628; C. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 Fordham L. Rev. 279, 286-87 (1984). For example, state laws generally provide subpoena power to arbitrators and counsel, and parties are encouraged to produce documents "to the fullest extent possible without resort to the issuance of the subpoena process."[15] Arbitrators may also direct the appearance of persons associated with member organizations or the production of records of these organizations without using the subpoena process.[16] That most stock exchanges and the N.A.S.D. offer a streamlined arbitration procedure for smaller claims also enables customers to resolve small disputes without incurring great expense.[17] Arbitration also offers an expeditious result. According to a survey conducted by the accounting firm of Deloitte Haskins & Sells ("DH&S") at the request of the New York Stock Exchange, Inc., the average arbitration proceeding took almost six months less, from filing of the com-

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14 *See* Sixth Report of the Securities Industry Conference on Arbitration Statistical Report (August 1989) excerpts of which are reproduced in the Appendix to this Brief.

15 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9548 (Rule 610); N.A.S.D. Manual (CCH) ¶ 3732; N.Y.S.E. Rule 619(f); Uniform Code of Arbitration § 20; C. Katsoris, *supra*, at 286.

16 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9549 (Rule 611); N.A.S.D. Manual (CCH) ¶ 3733; N.Y.S.E. Rule 619(g); Uniform Code of Arbitration § 20.

17 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9551H (Rule 621); N.A.S.D. Manual (CCH) ¶ 3710; N.Y.S.E. Rule 601; Uniform Code of Arbitration § 2.

plaint to the ultimate judgment, than the average litigation.[18] In addition, according to statistics complied by the Securities Industry Conference on Arbitration, nearly 6,101 securities industry arbitrations were filed with stock exchanges and the N.A.S.D. in 1988, and 3,740 arbitrations in the securities industry were resolved during that year.[19] The 1988 figures represent more than four times the number of arbitrations filed in 1982.[20]

Finally, the excessive caseload in the federal district courts makes it all the more important that arbitrable claims between securities firms and their customers proceed to arbitration. Filings of ERISA claims increased by 625 to 6,704 filings in 1988.[21] Since the average caseload per United States District Judge in 1988 was 493 cases,[22] permitting agreements to arbitrate all ERISA claims would effectively create up to 13 new federal district judgeships, which could help to relieve the federal courts of their overloaded dockets.

POINT II

THE COURT BELOW MISAPPLIED THE STANDARD FOR FINDING AN IMPLIED REPEAL OF THE UNITED STATES ARBITRATION ACT

In reaching its decision below, the Court of Appeals concluded that Congress intended to repeal the Arbitration Act with respect to ERISA claims. Yet because it divined congres-

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18 New York Stock Exchange Response to the Securities and Exchange Commission Request for Review of Predispute Arbitration Agreements, October 14, 1988, *reprinted in* P. Hoblin, Jr., *Securities Arbitration Procedures Strategies Cases* (2d Supp. 1989). DH&S used a sample of 243 cases (66 litigations, 142 arbitrations, and 35 litigations transferred to arbitration) over a three month time frame.

19 *See* Appendix.

20 The number of filings rose from 1,340 in 1982 to 6,101 in 1987. *See* Appendix.

21 Annual Report of the Director of the Administrative Office of the United States Courts 1988 at 10 (1988).

22 Annual Report of the Director of the Administrative Office of the United States Courts at 7, 14 (1988).

sional intent without adequate legislative evidence, the court below reached an incorrect result by misapplication of the standard set by this Court.

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.* requires that any finding of an implied repeal of the Arbitration Act be supported by "congressional intention expressed in some other statute. . . ." 473 U.S. at 627. This is simply a reiteration of the traditional standard for finding that a federal statute has been repealed by implication by a subsequently enacted federal statute. *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 88 (1982) (" 'repeals by implication [of a prior statute by a subsequently enacted one] are disfavored' ") (quoting *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980)); *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention [by Congress] to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable").

In *Mitsubishi*, this Court stated:

> We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.

473 U.S. at 628.

Under this test, there can be no question that predispute agreements to arbitrate ERISA claims are enforceable under the Arbitration Act. ERISA contains no statutory language that restricts a party's ability to choose an arbitral forum with respect to claims brought thereunder.[23] Nor is there any evidence in the legislative history of ERISA that Congress intended to repeal the Arbitration Act with respect to ERISA

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23 Quite to the contrary, Section 1144(d) of the ERISA provides:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in Sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

29 U.S.C. § 1144(d). Sections 1031 and 1137(b) do not refer to the Arbitration Act in any way.

claims. In the words of the Court of Appeals for the Eighth Circuit in *Arnulfo P. Sulit, Inc.* v. *Dean Witter Reynolds, Inc.*, 847 F.2d 475, 478 (8th Cir. 1988), "our examination reveals no congressional intent to single out ERISA claims for exemption from the general federal policy favoring rigorous enforcement of agreements to arbitrate . . . ."

None of the legislative matter cited by the court below can qualify as evidence of a congressional intent to repeal the Arbitration Act. That Congress bestowed exclusive jurisdiction on the federal courts to hear ERISA claims does not demonstrate an intent to repeal the Arbitration Act. To the contrary, this Court in *McMahon* held that agreements to arbitrate claims arising under the Securities Exchange Act of 1934, 15 U.S.C. § 78 *et seq.* (the "Exchange Act"), to be enforceable under the Arbitration Act even though Section 27 of the Exchange Act, 15 U.S.C. § 78aa, provides for exclusive federal jurisdiction over Exchange Act claims. If an exclusive federal jurisdiction provision does not show congressional intent to repeal the Arbitration Act with respect to Exchange Act claims, it cannot do so with respect to ERISA claims.

As to the reference in the ERISA conference report to Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, that reference applies only to "actions to enforce or clarify benefit rights provided under title I [of ERISA]," H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 5034, 5107, and not to actions for breach of fiduciary duty, like the case at bar.[24]

Last, the three cases decided by this Court that the Court of Appeals cited in support of its opinion, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), *McDonald* v. *City of West Branch*, 466 U.S. 284 (1984), have no bearing on this case. All those cases concerned the enforceability and binding effect

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24 The Court of Appeals acknowledged that Section 301 deals with "the applicable law for the breach of a collective bargaining agreement." 871 F.2d at 298.

of agreements to arbitrate contained in collective bargaining agreements purporting to bind individuals subject to those agreements, as opposed to a direct agreement among individual parties to arbitrate controversies. Their holdings depended upon factors unique to the context of arbitration clauses in collective bargaining agreements. In each case, the litigation of the employee's claim was controlled by the union involved, with the result that the employee lacked control over the proceeding, unlike the plaintiff here. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 58 n.19. Indeed, in each case, the Court specifically noted that the union prosecuting the claim might have a different interest than the employee whose claim it was. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 58 n.19; *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. at 742; *McDonald* v. *City of West Branch*, 466 U.S. at 291. Here, by contrast, where the plaintiff has full control over the prosecution of his claim, there is no possibility of such a conflict of interest. Likewise, the fact that arbitrators under collective bargaining agreements often have limited jurisdiction to enforce the terms of the collective bargaining agreement, and their expertise tends towards "the law of the shop, not the law of the land," *see Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 57; *McDonald* v. *City of West Branch*, 466 U.S. at 290-91, distinguishes them from the situation at bar. Here the arbitrators of the various stock exchanges have plenary power to resolve any claims brought before them. In short, there can be no application of the rules of *Alexander*, *Barrentine*, and *McDonald* beyond the issue of the effect of arbitration agreements in collective bargaining cases, and those cases in no way impair the governance of *Rodriguez*, *McMahon*, and *Mitsubishi* to this case.

POINT III

THE CIRCUITS STAND IN CONFLICT AS TO THE ARBITRABILITY OF ERISA CLAIMS

A direct conflict now exists among the Courts of Appeal with respect to whether a predispute agreement to arbitrate claims

arising under the Securities Act is enforceable. The decision below directly conflicts with the decision of the Court of Appeals for the Eighth Circuit in *Arnulfo P. Sulit, Inc.* v. *Dean Witter Reynolds, Inc.*, 847 F.2d 475 (1988). There, the Court of Appeals followed the analysis employed by this Court in *Mitsubishi*, *McMahon*, and *Rodriguez* and held that agreements to arbitrate ERISA claims are enforceable under the Arbitration Act.

CONCLUSION

For the reasons set forth above, *amici curiae* the Securities Industry Association, The Advest Group, Inc., J.C. Bradford & Co., Dain Bosworth Incorporated, D.A. Davidson & Co., Inc., Dean Witter Reynolds Inc., A.G. Edwards & Sons, Inc., Goldman, Sachs & Co., J.J.B. Hilliard, W.L. Lyons, Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Piper, Jaffray & Hopwood Incorporated, Prescott, Ball & Turben, Inc., Prudential-Bache Securities Inc., and Wheat, First Securities, Inc., respectfully request that the petition for a writ of *certiorari* be granted.

Dated: September 6, 1989

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APPENDIX

Sixth Report of the Securities Industry Conference on Arbitration Statistical Report (August 1989)

COMPOSITE ARBITRATION FIGURES

	Total Cases Received	Total Cases Concluded Including Settlement	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	830	686	332	269	410	205
1981	1,042	980	306	357	532	264
1982	1,340	1,044	322	292	558	293
1983	1,731	1,259	416	320	622	331
1984	2,449	1,762	561	489	736	366
1985	2,796	2,190	664	520	961	530
1986	2,838	2,460	657	610	1,017	506
1987	4,358	2,958	827	641	1,153	636
1988	6,101	3,740	1,473	930	1,561	743

AMERICAN STOCK EXCHANGE, INC.

	Total Cases Received	Total Cases Concluded Including Settlement	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	45	41	18	11	35	16
1981	39	40	7	11	42	22
1982	37	31	9	4	16	10
1983	41	42	14	8	10	6
1984	69	53	16	14	45	26
1985	64	58	21	14	41	24
1986	63	60	20	28	31	14
1987	92	74	34	24	41	24
1988	100	63	21	29	27	12

Cases carried over into 1989: 87

BOSTON STOCK EXCHANGE, INC.

	Total Cases Received	Total Cases Concluded Including Settlement	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	2	2	2	2	2	0
1981	2	2	2	2	0	0
1982	1	1	1	1	1	1
1983	2	2	2	2	2	1
1984	0	0	0	0	0	0
1985	0	0	0	0	0	0
1986	2	2	2	2	2	0
1987	0	0	0	0	0	0
1988	0	0	0	0	0	0

Cases carried over into 1989: 0

CHICAGO BOARD OPTIONS EXCHANGE, INC.

	Total Cases Received	Total Cases Concluded Including Settlement	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	44	31	11	11	18	6
1981	41	32	10	8	12	3
1982	50	38	6	6	14	3
1983	75	45	5	4	13	6
1984	91	56	24	16	4	3
1985	64	38	10	5	0	0
1986	72	44	16	9	12	9
1987	130	93	29	33	22	9
1988	149	89	22	27	48	12

Cases carried over into 1989: 151

MIDWEST STOCK EXCHANGE, INC.

	Total Cases Received	Total Cases Concluded Including Settlement	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	2	2	1	0	1	1
1981	2	2	0	0	0	0
1982	1	0	0	0	0	0
1983	2	2	0	0	0	0
1984	1	0	0	0	0	0
1985	1	0	0	0	0	0
1986	4	0	1	0	0	0
1987	5	3	1	1	1	1
1988	1	7	0	0	0	0

Cases carried over into 1989: 2

MUNICIPAL SECURITIES RULEMAKING BOARD

	Total Cases Received	Total Cases Concluded Including Settlement	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	21	21	7	7	3	2
1981	25	25	5	5	7	4
1982	33	16	7	7	13	6
1983	78	40	17	9	14	5
1984	113	80	20	17	34	21
1985	91	118	31	35	54	31
1986	82	89	30	21	30	15
1987	106	90	38	34	42	24
1988	115	126	49	52	63	37

Cases carried over into 1989: 59

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

	Total Cases Received	Total Cases Concluded Including Settlement	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	318	234	134	113	122	56
1981	422	422	142	177	242	118
1982	606	435	157	139	276	140
1983	768	549	216	147	272	161
1984	1,108	747	298	244	381	196
1985	1,400	962	377	250	434	232
1986	1,587	1,199	390	327	476	248
1987	2,866	1,625	458	325	642	364
1988	3,990	2,169	1,084	539	934	432

Cases carried over into 1989: 4,005

NEW YORK STOCK EXCHANGE, INC.

	Total Cases Received	Total Cases Concluded Including Settlement	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	367	327	131	110	221	119
1981	477	433	117	134	214	111
1982	558	473	109	113	214	118
1983	713	532	136	122	276	137
1984	1,008	796	176	183	259	113
1985	1,095	962	198	190	424	221
1986	965	1,004	181	205	432	210
1987	1,050	1,000	225	204	378	200
1988	1,623	1,196	263	235	440	228

Cases carried over into 1989: 1,269

PACIFIC STOCK EXCHANGE, INC.

	Total Cases Received	Total Cases Concluded Including Settlement	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	24	28	12	11	4	3
1981	24	20	17	17	9	5
1982	31	21	15	11	10	7
1983	35	29	17	17	23	10
1984	45	26	21	11	10	7
1985	50	40	12	18	20	12
1986	41	37	9	13	18	8
1987	64	58	27	11	23	13
1988	99	77	30	40	45	20

Cases carried over into 1989: 86

PHILADELPHIA STOCK EXCHANGE, INC.

	Total Cases Received	Total Cases Concluded Including Settlement	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	7	0	16	4	4	2
1981	10	6	6	3	6	1
1982	23	15	18	11	14	8
1983	17	19	9	11	12	5
1984	14	7	6	4	3	0
1985	31	18	15	8	8	2
1986	22	15	10	6	7	2
1987	25	15	15	9	4	1
1988	24	13	4	8	4	2

Cases carried over into 1986: 42